

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

RANDEL MCDONALD, ET AL.,

Appellants

v.

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL.,

Respondents

DOCKET NUMBER WD77854

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: March 31, 2015

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Bryan Round, Judge

Appellate Judges:

Division Three
Victor C. Howard, P.J., James Edward Welsh, and Gary D. Witt, JJ.

Attorneys:

Paul Hasty, Jr., Overland Park, KS
Kathryn O'Shea, Overland Park, KS

Counsel for Appellants
Co-Counsel for Appellants

Attorneys:

Aaron French, St. Louis, MO
Meghan Lewis, Overland Park, KS

Counsel for Respondents
Co-Counsel for Respondents

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**RANDEL MCDONALD, ET AL., Appellants, v. INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA, ET AL., Respondents**

WD77854

Jackson County

Before Division Three Judges: Howard, P.J., Welsh, and Witt, JJ.

Randel and Kathryn McDonald, doing business as McDonald Marketing Services, appeal the circuit court's judgment in an equitable garnishment action finding that Insurance Company of the State of Pennsylvania (ICSOP) is entitled to a credit in the amount of \$62,500 for amounts paid to the McDonalds by two different insurance carriers in an underlying lawsuit in the District Court of Wyandotte County, Kansas. The McDonalds assert six points on appeal. The McDonalds contend that the circuit court erred: (1) by admitting evidence of payments by their insurance carrier, Charter Oak Fire Insurance Company, because evidence of payments from a collateral source is inadmissible and prejudicial; (2) by admitting evidence of their settlement with Charter Oak because the settlement was irrelevant, immaterial, and prejudicial and may not be used to mitigate the damages owed by ICSOP, (3) by finding that ICSOP is entitled to a credit for their settlement of claims against Charter Oak and Certain Underwriters at Lloyd's of London because ICSOP cannot re-litigate the liability of its insured in the underlying lawsuit and is bound by the judgment entered in the underlying lawsuit, (4) by failing to enter judgment in their favor and against ICSOP for the entirety of the judgment entered by the court in the underlying lawsuit because the judgment is binding on ICSOP in an equitable garnishment action, (5) by failing to award them prejudgment interest because they are entitled to prejudgment interest pursuant to section 408.020, RSMo 2000, and (6) by failing to assess court costs against ICSOP because they are entitled to costs pursuant to section 514.060, RSMo 2000, and Rule 77.01.

Reversed and Remanded

Division Three holds:

(1) No dispute exists in this case that the McDonalds paid Charter Oak for first party insurance coverage for any damage to their property. The McDonalds, therefore, contracted for insurance through Charter Oak with funds that they could have used for other purposes. As such, they are entitled to the benefit of their bargain. Pursuant to the collateral source rule, Bam, Inc., as the wrong doer, and its insurer should not benefit from the expenditures made by the McDonalds in procuring insurance coverage from Charter Oak. Under the collateral source rule, ICSOP cannot obtain a credit for a payment made by the McDonalds' collateral source and cannot introduce evidence on such as an affirmative defense. The circuit court, therefore, erred in admitting evidence of the payment/settlement made by Charter Oak and erred in ordering that ICSOP was entitled to a credit for the Charter Oak settlement.

(2) Given that ICSOP had the opportunity to control and manage the underlying lawsuit but failed to seize the opportunity, ICSOP is not entitled to a credit for the McDonalds' settlement of their claim against Lloyd's. ICSOP cannot deny coverage and refuse to defend an

insured and then try to re-litigate the damages owed by its insured in an equitable garnishment action.

(3) The McDonalds established that they obtained a judgment in their favor against Bam in the District Court of Wyandotte County, Kansas, that ICSOP's insurance policy was in effect when the damage to the McDonalds' property occurred, and that the damage to the property was covered by the insurance policy. Thus, the underlying judgment entered by the District Court of Wyandotte County, Kansas, is binding on ICSOP through collateral estoppel. Therefore, because ICSOP was not entitled to any credits for the settlement payments by Charter Oak or Lloyd's, the circuit court erred in failing to enter judgment against ICSOP for the entirety of the judgment entered by District Court of Wyandotte County, Kansas, in the underlying lawsuit.

(4) In equitable actions, the determination of whether to award prejudgment interest and costs is left to the discretion of the circuit court. Because we are reversing the circuit court's judgment to the extent that it found that ICSOP was entitled to a credit in the amount of \$62,500 for amounts paid to the McDonalds by their settlement of claims with Charter Oak and Lloyd's, we feel compelled to remand this case to the circuit court for it to determine whether it wants to exercise its discretionary power to award prejudgment interest and costs in this case.

Opinion by James Edward Welsh, Judge

March 31, 2015

* * * * *

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.